SHOULD COMMON-LAW PLEADING BE TAUGHT IN A VIRGINIA LAW SCHOOL?

"If there's a hole in a' your coats,
I rede you tent it;
A chiel's amang ye takin' notes,
And, faith, he'll prent it."

In the December REGISTER, the accomplished editor, Judge Duke, thus relates his unhappy experience while attending the class in common-law pleading in the University of Virginia:

"Our wonder grew, as the lecturer spoke of demurrer and traverse and of various and other long forgotten subjects, why we held on to a science so absolutely unnecessary. And still the wonder grew why valuable time should be wasted in learning so many things which the busy practitioner forgets before the half of a decade has rolled away. * * * We felt, as we listened, that these boys were indeed being 'suckled in a creed outworn;' and that the time had come when the hours spent in mastering the 'subtleties of common-law pleading' might be devoted to the weightier matters of the law."

I

That a lawyer in Virginia should speak of *demurrer* and *traverse* as "long forgotten subjects," and as "things which the busy practitioner forgets before the half of a decade has rolled away," is passing strange, since they are in constant and every-day use with us—as familiar as the alphabet or the multiplication table.

That a law teacher in Virginia should be censured for mentioning *demurrer* and *traverse,* as "words most monstrous for ears to hear," has probably not been paralleled except by Jack Cade's indictment of the Lord Say, as reported by Shakspeare in King Henry VI: "It will be proved to thy face that thou hast men about thee that usually talk of a *noun* and a *verb,* and such abominable words as no Christian ear can endure to hear." Indeed, a lawyer, it would seem, is more excusable for such guilty knowledge of *demurrer* and *traverse* than a layman for the iniquity of acquaintance with a *noun* and a *verb*; for a layman might make shift to get on in ignorance of his "parts of speech," whereas *demurrer* and *traverse* are part of the lawyer's stock in trade, whereby he has his living.

II

But the learned Judge may reply that while reasons may be found for teaching common-law pleading in a Virginia law school to Virginia law students, they are inapplicable to a law school like that of the University of Virginia, where about one-half of the law students are from other States (many of them from "Code States"), and do not propose to practice law in Virginia. He would, perhaps, contend that common-law pleading should at least be an *elective* (as is the case at the University of Virginia with *Virginia Pleading, Virginia Practice,* and *Code Pleading*), and should not be required of *all* law students as a condition of graduation.

The above contention has a sort of plausibility, but the best answer to it has been made by Judge Cooley (Cooley's Blackstone, vol. I, xxvii :

"Nor are the works on common-law pleading superseded by the new codes which have been introduced in so many of the States. A careful study of those works is the very best preparation for the pleader, as well where a code is in force as where the old common-law forms are still adhered to. Any expectation that may have existed that the code was to banish technicality, and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in a logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code which will stand the test on demurrer, than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defence, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to leave his rights in doubt on his own showing. Let the common-law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the old practice by the new road."

So far Judge Cooley. It will be seen that he declares that the friends of code pleading, after a trial of that system for

many years, *must* confess the importance of a knowledge of common-law pleading to a practitioner under the code. The fact is that friends of code pleading *do* confess not only the importance but the *necessity* in the Code States of acquaintance with common-law pleading. Even the text-writers on Code Pleading bear testimony to this. Thus Bliss (Code Pl., § 141) says: "It is assumed that the student of the code is familiar with the common-law and equity systems of pleading. If not, he is groping in the dark, and much that is offered will escape his apprehension. This knowledge is deemed essential, not only because well-educated lawyers must know the history of our jurisprudence, must live through, as it were, and measure every step of its marvelous progress, but because the foundation idea of pleading has not been changed."

And Phillips says (Code Pl., Preface iv): "The common-law system of pleading in its finished state was regarded as a marvel of inventive genius, a masterpiece of subtle refinement, and a model of logical exactness. It held high rank as a means of intellectual and legal discipline; it was a leading topic in legal education; and mastery of this legal technique was a mark of sound and thorough training." And in § 165, Phillips declares of common-law pleading: "Its chief distinguishing excellence is the complete separation of law and fact, not only in the pleading, but in the trial. It formulated a system of general rules of statement and construction that have not been excelled, *and that cannot be dispensed with.*"

Fas est et ab hoste doceri. But the highest testimony that writers on the code bear to the value of a knowledge of common-law pleading is found in the fact that they precede their exposition of the code with a summary of the doctrines of common-law pleading, usually condensed from that classic, Stephen on Pleading (text-book in the University of Virginia Law School). Actions speak louder than words. It may be added that the "distinguishing excellence of common-law pleading, the complete separation of law and fact," of which Phillips speaks above, is accomplished by the use of *demurrer* and *traverse*, at the very mention of which in the class-room Judge Duke was "immediately offended." And it is interesting to note that in his 78 pages devoted to common-law procedure, Judge Phillips

not only dares to speak of *demurrer* and *traverse,* but explains such "subtleties of common-law pleading" as "special traverse," "traverse *de injuria,*" and "various and other long forgotten subjects." Well may the enemies of common-law pleading exclaim, *"Et tu Brute!"*

III

But Judge Duke will probably declare that he cares nothing for the American codes of procedure; that he has but "one heart's desire and mistress of his soul," and that is the English Practice Act; and this may readily be conceded by all faithful readers of his editorials in the REGISTER. Indeed his "objurgatory expressions" (as our learned William Green would have called them) on common-law pleading are found to be but a prelude to renewed praise of the English Practice Act. Thus ("still harping on my daughter") he declares: "Virginia in civil procedure holds on to a system which England has discarded for over thirty years. And further the system England has adopted is simplicity itself, and has been found to work easily, to require no 'subtlety,' and to expedite both the procedure in the courts and the cause of justice."

We may assume here, for the sake of argument, that the English Practice Act has merits, without conceding that, even after its adoption in Virginia (when Judge Duke will sing *Nunc Dimittis*) the study of common-law pleading should cease in a Virginia Law School Doubtless we should have the experiences of the Code States, narrated above. But with reference to *demurrer* and *traverse,* we are not left to conjecture as to their continued importance, even in England, under the Practice Act. In his Address before the American Bar Association in 1907 (Report, 1907, page 454), Hon. James Bryce, British Ambassador to the United States, says:

"I have referred to exactitude of thought and expression as one of the excellences which we justly admire in the sages of the common law, and particularly in the deliverances of the judges. That exactitude has become a feature of all our legal thinking and legal writing, and has in particular made us separate more clearly than the lawyers of some other nations do, strictly legal considerations from those that belong to the sphere of morality or sentiment.

"We owe it in no small measure to the old system of pleading which slowly matured and refined to a perhaps excessive point

of technicality, gave to the intellects of many generations of lawyers a very sharp edge. That system had the great merit of impressing upon them the need of distinguishing issues of law from issues of fact. The first lesson a student learns is to consider in any given case whether he ought to plead or to demur. It is a lesson of value to all of us in our daily life. Half of the confusion of thought in the world (certainly not excepting the world of political discussion) arises because men have not learned to ask themselves whether the issue is one of fact or of principle. 'Do I deny the facts, or do I dispute the inference? Ought I to plead or to demur?'"

But what is this but the despised *demurrer* and *traverse*? Surely "the stone which the builders rejected is become the head of the corner." And yet we have this lamentation from our modern Jeremiah: "We felt as we listened that these boys were indeed being 'suckled in a creed outworn,' and that the time had come when the hours spent in mastering the 'subtleties of common-law pleading' might be devoted to weightier matters of the law." Here we have the contempt for "learning," and the demand for something "practical," which is calculated to change the law from a profession to a trade. Even if not of immediate practical use (which is not conceded), yet the "science of judicial statement" as developed by the common law—this "fine juridical invention," as Stephen calls it, possesses such cultural and disciplinary value as to rank with logic and metaphysics. How much practical use have the students of Dr. McGuffey (for *memorabilia* of whom we are indebted to Judge Duke), and of Prof. Noah K. Davis, made of their courses? And yet many men declare their lifelong indebtedness to these great teachers, at whose feet they sat and learned "exactitude of thought and expression," and mastered unpractical subjects by which "their intellects were given a very sharp edge." And as to the "weightier matters of the law," it should be remembered that in a three years' course at the University of Virginia only twenty-six lectures are devoted to common-law pleading. "These ought ye to have done, and not to leave the other undone."

IV

But what of the English Practice Act? Will it be adopted in Virginia? The agitation with this object in view was begun

by Judge Duke as far back as 1907, when at the meeting of the Virginia State Bar Association, on the Jamestown Exposition grounds, he offered the following resolution:

"*Resolved*, That a committee of five members of this Association be appointed by the President to consider and report to the next meeting the advisability of memorializing the General Assembly of Virginia to adopt the English Practice Act, with such modifications as may be deemed best; and the sum of not more than $25.00 is hereby appropriated for the purchase of such books as may be needed by the committee."

The resolution was adopted, and the President, Hon. A. C. Braxton, appointed as the committee, R. T. W. Duke, Jr., Robert T. Barton, Charles A. Graves, Charles V. Meredith, and Archer A. Phlegar.

The above committee has been regularly continued up to the present time; but, strange as it may seem, Judge Duke, the chairman, has never called the committee together in the interval between the sessions of the Bar Association. The committee has, in fact, had but one meeting in four years; and that was at the session of the Bar Association, at Hot Springs, Va. August 3, 1908.

At this meeting there were present R. T. W. Duke, R. T. Barton, C. A. Graves, and S. S. P. Patteson, the latter having been substituted in the place of C. V. Meredith, who was absent, as was also A. A. Phlegar.

A report favoring the adoption of the English Practice Act was presented by S. S. P. Patteson, but did not receive the votes of a majority of the committee. Instead, the majority of the committee voted to make the following recommendation to the Bar Association:

"We recommend that § 3112 of the Code of Virginia be amended and re-enacted so as to read as follows:

"The Supreme Court of Appeals shall prescribe the forms of writs and make general regulations for the practice of all the courts; and shall as speedily as possible prepare a system of rules of practice, and a system of pleadings and the forms of process to be used in all the courts: provided, however, that such system shall prescribe one form of action for all actions as they now exist it common law, and in lieu of the rights of motion as it now exists by statute. And provided, further, that

such system shall give the right to transfer any complaint, asserted by such form of action as prescribed, to the equity side of the court, upon such conditions as may be prescribed by the trial court; and the change of any bill in equity, to a complaint proper to be asserted by such form of action, into such action, upon conditions to be prescribed by the trial court." See Report Va. State Bar Ass'n 1908, pp. 17, 100.

It has been deemed proper to set out this recommendation in full, as it is omitted altogether (inadvertently of course) in the Report of the Committee as printed in 14 Va. Law Reg. 401-408; and even in the Official Report of the Bar Ass'n (1908, p. 105), words are retained from the draft of Mr. Patteson, which while perhaps consistent with the *personal* sentiments of the majority of the committee, were omitted from its recommendation to the Bar Association. These words are: "For English speaking countries, the present English procedure is best; and we most earnestly recommend its adoption in this State." The writer of this article declined to concur in the original recommendation of Mr. Patteson, or in the recommendation as adopted by the majority of the committee.

At the conclusion of a spirited debate on the above recommendation (Report Va. State Bar Ass'n, pp. 17-40, where Judge Henson should be substituted for "Judge Hutton," who was not present), on the motion of Judge Duke no vote was taken on the recommendation, but its further consideration was postponed until the next meeting of the Association, the committee being continued as originally constituted; and on motion it was ordered that 2,000 additional copies of the report be printed for general distribution.

The status, therefore, of the English Practice Act now in Virginia is that it has never been recommended to the Bar Association for approval, not even by Judge Duke's committee in 1908, the majority of the committee voting for the resolution above set forth instead of recommending the adoption of the English Practice Act, Judge Duke thus abandoning the lady of his choice to the tender mercies of the Court of Appeals, who, under the resolution, might adopt, with some qualifications, the English Practice Act, or Code Pleading, or what they pleased. But it seems that he has now repented of this want of fidelity to his own true love; for at the last meeting of the Association

we are informed that leave was given to print a form of practice act which had been drawn up by a member of the committee on Reform in Law Practice, to be submitted to the next meeting of the Bar Association for its approval or rejection. This member of the committee is understood to be Judge Duke; and who can doubt that the "form of practice act" bears a close resemblance to his beloved English Practice Act?

In the December REGISTER, p. 629, Judge Duke says:

"We sincerely hope that in the ranks of the General Assembly, which meets next January, there may be some lawyers—for this work must be done by lawyers—who will be bold enough and wise enough to set in motion some process by which the antiquated and cumbrous system of common-law pleading, as at present practised in this State, may be swept into the 'lumber room and charnel house of time.' We commend to their attention the English Practice Act, or the Connecticut Code of Civil Procedure."

Thus apparently despairing of success in the State Bar Association, Judge Duke makes his "appeal unto Caesar"—the Legislature. And yet for four years he has been chairman of a committee of the Bar Association on "Amendment of Practice," and has never even brought the matter to a vote in the Association. And at the last meeting of the Bar Association, leave was given to print a form of practice act, drawn up by Judge Duke as a member of the committee on Reform in Law Practice, to be brought before the Association at its next meeting. While the matter is thus pending in the Bar Association, it seems strange that the chairman of the committee should urge independent action by the Legislature, without waiting for a recommendation of the Bar Association. He has, of course, a right of appeal from an adverse decision of the Bar Association; but he is too good a lawyer not to know that there should be a final judgment of the court below before he is entitled to sue out a writ of error. As to the Bar Association, we commend to him the lines:

"He either fears his fate too much,
Or his deserts are small,
That dares not put it to the touch,
To gain or lose it all."

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